

1 JOHN A. RUSSO, City Attorney - SBN 129729  
2 RANDOLPH W. HALL, Assistant City Attorney - SBN 080142  
2 RACHEL WAGNER, Supervising Trial Attorney - SBN 127246  
3 CHRISTOPHER Kee, Deputy City Attorney - SBN 157758  
3 One Frank H. Ogawa Plaza, 6th Floor  
Oakland, California 94612  
4 Telephone: (510) 238-7686, Fax: (510) 238-6500  
Email: [ckee@oaklandcityattorney.org](mailto:ckee@oaklandcityattorney.org)  
5 25404/520038

6 Attorneys for Defendants  
7 CITY OF OAKLAND, et al.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

12 DEMETRIUS L. HARVEY,  
13 Plaintiff,  
14 v.  
15 CITY OF OAKLAND, a municipal  
Corporation; OAKLAND POLICE  
16 DEPARTMENT; WAYNE TUCKER, Chief,  
Oakland Police Department; DEPUTY  
17 CHIEF HOWARD JORDAN,  
OAKLAND POLICE LIEUTENANT GIER,  
18 OAKLAND POLICE LIEUTENANT  
WHITMAN, OAKLAND POLICE OFFICER  
19 DOMINIQUE AROTZARENA,  
OAKLAND POLICE OFFICER J. MORRIS,  
20 OAKLAND POLICE OFFICER MUSCHI,  
OAKLAND POLICE OFFICER GUTIERREZ,  
21 In their official and individual capacities,  
Does 1 through 50, inclusive.

Defendants.

CASE NO. C07-01681 SBA

**ORDER RE: DEFENDANTS' MOTION  
TO FOR SUMMARY JUDGMENT, OR,  
ALTERNATIVELY, PARTIAL SUMMARY  
JUDGMENT**

[  
Date: October 21, 2008  
Time: 1:00 p.m.  
Dept: Courtroom 3, 3<sup>rd</sup> floor

The Honorable Sandra Armstrong

1

## I. INTRODUCTION

2 Before the court is defendants' motion for summary judgment, or, alternatively  
 3 partial summary judgment. For the reasons set forth below, defendants' motion is  
 4 granted.

5

## II. STATEMENT OF FACTS

6 On November 23, 2005, Kaled Saled was working at the San Pablo Liquor market  
 7 at 2363 San Pablo Avenue in the City of Oakland. At approximately 10:30 p.m. a group of  
 8 10-12 black men dressed in business suits and bow ties came into the store, one of whom  
 9 identified himself as a Muslim. Another of the men had a black semi-automatic handgun.  
 10 At a signal from one of the men, they began to smash out windows of the store's  
 11 refrigerator, and smash liquor bottles. Damage was estimated at \$19,000 dollars. The  
 12 incident was recorded on a surveillance video. Defendants Supporting Evidence Re:  
 13 Motion for Summary Judgment, or, Alternatively, Partial Summary Judgment, (DSE)  
 14 Exhibit 1 at paragraph 2; Exhibit 1(B) at pg. 1.

15 That same evening, Ehab Taha was working as a cashier at New York Market,  
 16 located at 3446 Market Street in Oakland, when approximately 10-11 black men in dark  
 17 business suits and bow ties entered the store. An older black man appeared to be their  
 18 leader; younger members were armed with metal pipes, knives, and guns. Taha, thinking  
 19 it was a robbery attempted to raise a shotgun; he was punched in the face several times,  
 20 causing him to bleed. The older man told Taha he did not want him to sell liquor to the  
 21 black community, at which point the other members of the group began to vandalize the  
 22 store. They left with the shotgun. Here too, damage was estimated at \$19,000. There  
 23 was however no video. DSE, Exhibit 1(A); Exhibit 1(B) at pg. 2.

24 On November 24, 2005, Oakland Police Sergeant Dominique Arotzarena was  
 25 assigned as the lead investigator for these crimes, which were deemed felonies. As part  
 26

1 of his investigation he obtained a copy of the surveillance video of the San Pablo Market  
 2 incident from ktvu.com, the one obtained from the market itself being inoperable. DSE,  
 3 Exh. 1 at paragraph 2, 4.

4 On November 25, 2005, Sgt. Arotzarena met with a confidential informant known as  
 5 CI-21. CI-21 had independent knowledge of the men appearing in the video as associates  
 6 of Your Black Muslim Bakery. In his meeting with Sgt. Arotzarena, CI-21 appeared  
 7 credible and knowledgeable about the Black Muslim Bakery organization. DSE, Exhibit 1,  
 8 paragraph 5.

9 Upon viewing the ktvu.com video, CI-21 identified several persons on the video by  
 10 name. (The original surveillance video was still inoperable.) CI-21 identified Jamal Bey  
 11 (aka Yasir Hakeem Azzem and Jamail Robinson), Asad Bey, Dyamen Williams, Donald  
 12 Cunningham, and Yusuf Bey IV, as being inside the store. CI-21 described each of these  
 13 person's connection to the Black Muslim Bakery organization.

14 C-21 specifically described "Asad Bey" as a man behind the counter when the  
 15 crimes were committed. He stated that Asad Bey was 21-23 years old, 5'-6" to 5'-7", 140-  
 16 150 pounds, bald head, and had a certain shape to his face. DSE, Exhibit 1 at paragraph  
 17 7.

18 Also on November 25, 2005, Sgt. Arotzarena obtained confidential information from  
 19 other police department sources that the person identified by CI-21 as "Asad Bey" was  
 20 Demetrius Harvey, who was associated with the Black Muslim Bakery. He obtained the  
 21 names and photos of several persons identified in the video and approximately 14 photos  
 22 of known Black Muslim Bakery associates from the DMV. DSE, Exhibit 1 at paragraph 8.

23 From those photographs, CI-21 chose plaintiff Demetrius Harvey, identified him as  
 24 "Asad Bey", and confirmed that he was inside the store behind the counter in the ktvu.com  
 25 video. CI-21 signed the identifying photograph in Sgt. Arotzarena's presence. DSE,  
 26 Exhibit 1 at paragraph 9. Demetrius Harvey did in fact work at Your Black Muslim Bakery,

1 where he was called Asad Bey. DSE, Exhibit 2(A) at 18:5-21:2.

2       On November 27, 2005 Sgt. Arotzarena was informed that the mother of Yusuf Bey  
 3 had called a sergeant at the Oakland Police Department, wanting the police to talk with  
 4 her son about the case. CI-21 had identified Yusuf Bey as one of the individuals in the  
 5 video.<sup>1</sup> Later that day, three store employees from the San Pablo Liquor store, who had  
 6 been present when the crimes were committed, viewed a "six pack" photo lineup. They  
 7 each independently identified Yusuf Bey. One of the eyewitnesses further provided Yusuf  
 8 Bey's full name and said that he was associated with the Black Muslim Bakery. DSE,  
 9 Exhibit 1 at paragraph 11.

10       On November 29, 2005, Sgt. Arotzarena submitted sworn affidavits to the Alameda  
 11 County Superior Court (the Honorable Jacqueline Tabor) in support of warrants for 6  
 12 persons identified as being inside the San Pablo Liquor Store when the crimes were  
 13 committed. The identifications he submitted to the court matched up with information from  
 14 the Oakland Police Department Intelligence Division regarding the identity of Black Muslim  
 15 Bakery associates. DSE, Exhibit 1 at paragraph 12; Exhibit 1(B); Exhibit 4 at paragraphs  
 16 2-3. Sgt. Arotzarena believed every factual statement in the affidavit to be true at the time  
 17 that the sworn affidavit was submitted. DSE, Exhibit 1 at paragraph 13.

18       On November 29, 2005, a warrant was issued for Demetrius Harvey's arrest. DSE,  
 19 Exhibit 1 (C).

20       On December 27, 2005, plaintiff was a passenger in a car stopped for speeding on  
 21 Highway 180 in Fresno, CA; the driver had no license. At the request of the officer,  
 22 plaintiff showed his ID, at which point he was placed under arrest on the basis of the  
 23 warrant from Alameda County. Plaintiff was transported from Fresno to Oakland by

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24       1. Yusuf Ali Bey eventually pled guilty to nine felony counts related to these incidents.  
 25       Kahlil Raheem, Donald Cunningham, and Dyamen Williams, each also identified by CI-21,  
 26       pled no contest to a charge of felony vandalism. DSE, Exhibit 34, paragraphs 5-6.

1 Oakland Police officers. Second Amended Complaint (SAC) at paragraphs 2-4.

2 On December 30, 2005, Sgt. Arotzarena conducted an interview with plaintiff at the  
 3 Oakland Police Department. At the time of his interview, plaintiff appeared to Sgt.  
 4 Arotzarena to be in his early 20's, 5'7" tall, approximately 150 pounds, with very short hair.  
 5 Upon reviewing the video, Sgt. Arotzarena believed that plaintiff resembled the person  
 6 behind the counter in the ktvu.com video, who CI-21 had identified as Asad Bey, and  
 7 whom the sergeant had been informed by his colleagues was Demetrius Harvey. DSE,  
 8 Exhibit 1 at paragraph 16-17; Exhibit 1(D); Exhibit 1(H). Plaintiff alleges that he told  
 9 various police officers, including Sgt. Arotzarena, that they had the wrong guy, and that it  
 10 was not him in the video. SAC at paragraph 4-5 <sup>2</sup>

11 At Sgt. Arotzarena's request, three eyewitnesses from inside the San Pablo Market  
 12 the night the crimes were committed were brought to the police station. Witness and store  
 13 employee Kaled Saleh reviewed the surveillance store video to refresh his memory. The  
 14 Sergeant then showed Mr. Saleh a "six-pack" photo line-up of six photographs of similar  
 15 appearance, which included a photograph of Demetrius Harvey. Mr. Saleh completed and  
 16 signed a Photo Lineup Waiver Statement, identifying photograph #1 as the man behind  
 17 the counter. Photo #1 was the photograph of Demetrius Harvey. Mr. Saleh circled,  
 18 initialed and dated the photograph as well. DSE, Exhibit 1 at paragraph 20; Exhibit 1(E).

19 Sgt. Arotzarena met separately with the second witness and store employee Saleh  
 20 Ahmed. Mr. Ahmed reviewed the surveillance store video to refresh his memory. The  
 21 Sergeant provided Mr. Ahmed a "six pack" photo line-up, with six photographs of similar  
 22 appearance, including a photograph of Demetrius Harvey. Mr. Ahmed identified

23 \_\_\_\_\_  
 24 <sup>2</sup> Plaintiff alleges in his Second Amended Complaint that he refused to say anything to  
 25 the officers at the interview, and that Sgt. Arotzarena told plaintiff's father that it wasn't  
 26 plaintiff in the video. SAC at paragraphs 31-32. At his deposition he said that Arotzarena  
 told plaintiff that he knew that plaintiff wasn't in the video. He also testified that he told  
 Sgt. Arotzarena, among other things, the names of the individuals in the video, including  
 the individual he says the officers had identified as plaintiff.

1 Demetrius Harvey as the individual who held him against his will inside the store that night.  
 2 Mr. Ahmed signed a photo line-up waiver statement identifying photo #5 as the person  
 3 who held him against his will that night; photograph #5 was Demetrius Harvey. Mr. Ahmed  
 4 circled, initialed and dated the photograph of Mr. Harvey. DSE, Exhibit 1 at paragraph 21;  
 5 Exhibit 1(F).

6 Following these positive eyewitness identifications, plaintiff was arrested and  
 7 transported to jail on December 30, 2005. DSE, Exhibit 1 at paragraph 22.

8 Plaintiff was arraigned in Alameda County Superior Court on January 3, 2006 on  
 9 five felony counts: California Penal Code sections 594(A), 422.7, and three counts under  
 10 section 236. Bail was set at \$90,000. In bringing charges, the District Attorney exercises  
 11 its own independent discretion, and makes its own assessment as to such charges. DSE,  
 12 Exhibit 3; 3(A).

13 Plaintiff was released on bail on January 8, 2006. Plaintiff alleges that he was strip  
 14 searched while in the custody of the County. SAC at paragraph 21 .

15 On March 6, 2006, at the request of plaintiff and his attorney, plaintiff came to Sgt.  
 16 Arotzarena's office for another interview, which was recorded. At that meeting, plaintiff  
 17 identified the person behind the counter (that is, the person CI-21 and the eyewitnesses  
 18 had identified as plaintiff) as Cornell Hurst. At that meeting, plaintiff identified Hurst as  
 19 being within an inch of plaintiff's height, within 10 pounds of his weight, and with a similar  
 20 build and hairline. He admitted at the meeting that he (plaintiff) had been employed at the  
 21 Black Muslim Bakery until his friend Antar Bey was killed in late October of 2005. He  
 22 stated as well that someone who did not know them well could mistake Hurst and plaintiff  
 23 for one another. DSE, Exhibit 1 at paragraph 21; Exhibit 1(I).

24 Charges were dismissed against plaintiff on March 23, 2006. SAC at paragraph.

25 12

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### III. DISCUSSION

Plaintiff seeks recovery under both federal and state law claims.

## A. Federal Claims:

Plaintiff's First Cause of Action is brought under 42 U.S.C. section 1983. It seeks recovery for violation of plaintiff's rights under the 4<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution, and, it appears, also for an alleged violation of his 5<sup>th</sup> Amendment rights.

## 1. 14th Amendment

Plaintiff seeks recovery under the 14<sup>th</sup> Amendment on the grounds that the defendants “deprived him of liberty and property” without due process of law. SAC, paragraph 55. The allegations in the complaint, however, relate exclusively to claims of false arrest and false imprisonment. As such they are actionable, if at all, under the 4<sup>th</sup> Amendment, and not the 14<sup>th</sup>. See Graham v. Conner, 490 U.S. 386, 395 (1989); Albright v. Oliver, 510 U.S. 266, 273 (1994).<sup>3</sup> This is so even with respect to his allegations that he was subjected to illegal strip searches by county officials. Bell v. Wolfish 441 U.S. 520, 558-560; see also Bull v. City and County of San Francisco, ---F.3d --- (9<sup>th</sup> Cir. 2008); 2008 WL 3876757. In the absence of any allegations actionable under the 14<sup>th</sup> Amendment, defendants are entitled to judgment on those claims.

## 2. 4<sup>th</sup> Amendment

Plaintiff's 4<sup>th</sup> Amendment claims fall into three separate areas: (1) his initial arrest by Fresno police officers (2) his subsequent incarceration following his interview with Sgt.

<sup>3</sup> The Supreme Court has suggested “arguendo” that in some cases, false imprisonment can implicate due process when a suspect is subjected to prolonged detention in the face of repeated protestations of innocence. See Baker v. McCollan, 443 U.S. 137, 145 (1979). Here, however, it is undisputed that plaintiff here was held for only a short period before he was arraigned—the paradigmatic “process” to which he was entitled under the law. It is also not entirely clear if Baker’s supposition about due process survives Albright v. Oliver, which held that “The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.” Id., 510 U.S. at 274; see e.g. Russo v. City of Bridgeport, 479 F. 3d 196, 208-209 (2<sup>nd</sup> Cir. 2007) (217 day detention attributable to ignoring and withholding exculpatory evidence actionable under 4<sup>th</sup> Amendment, not 14th).

1 Arotzarena and (3) strip searches at the County jails.

2       **a.     Initial arrest**

3       An officer is not liable for damages based on a claim of false arrest if there was  
 4 probable cause to make the arrest. Pierson v. Ray (1967) 386 U.S. 547, 555-557.

5       Probable cause exists “where facts and circumstances within their (the officers’) knowledge and of which they had reasonable trustworthy information (are) sufficient in  
 6 themselves to warrant a man of reasonable caution in the belief that an offense has been  
 7 or is being committed.” Brinegar v. United States 338 U.S. 160, 175-176 (1949) (ellipsis  
 8 supplied). The Supreme Court further instructs that “in dealing with probable cause,  
 9 however, as the name implies, we deal with probabilities. They are not technical; they are  
 10 the factual and practical considerations of everyday life on which reasonable and prudent  
 11 men, not legal technicians act.” Id. at 175. Thus, probable cause “means less than  
 12 evidence which would justify condemnation; and in all cases of seizure, has a fixed and  
 13 well known meaning. It imports a seizure made under circumstances which warrant  
 14 suspicion.” Id. at 176 fn 14 (citing Locke v. United States, 7 Cranch 339 (1813).)

15       The record here shows that the initial arrest was supported by probable cause.  
 16 The affidavit provided by defendant Arotzarena in support of the application for the warrant  
 17 disclosed the following: employees in the vandalized stores identified the individuals in a  
 18 surveillance video as the ones who vandalized their stores. The employees stated that  
 19 they were held against their will by these individuals. A confidential informant with  
 20 independent knowledge of the group who vandalized the markets positively identified  
 21 several of the participants, including plaintiff, who the informant identified as Asad Bey.  
 22 The informant identified plaintiff both on the basis of a videotape and from his DMV  
 23 photograph. The informant also provided information that established the vandalism was  
 24 based on religious orientation. See DSE, Exhibit 1(B). Together, these facts establish the  
 25  
 26

1 elements of California Penal Code sections 236, 422.7 and 594(a).<sup>4</sup>

2 Arotzarena's case notes amplify his reasonable belief that plaintiff was involved in  
 3 the liquor store attacks. He explains that, based on his conversation with the confidential  
 4 informant, CI- 21, he found the informant "very credible and knowledgeable about the Bey  
 5 Organization." CI-21's identification of plaintiff as "Asad Bey" was based on his age,  
 6 height and weight (21-23; 5-6-5-7; 140-150), and other characteristics including a "bald  
 7 head" a "mark on his face" and the "shape of his face." In the course of CI-21's review of  
 8 the videotape he corrected his initial identification, clarifying that plaintiff was not in a white  
 9 suit, but was the individual "behind the counter." See DSE, Exhibit 1(H) at pg. 2.

10 Moreover, as Sgt. Arotzarena explains, the identifications were corroborated by the  
 11 Department's intelligence unit. DSE, Exhibit (1) at paragraph 8.

12 While plaintiff asserts that he was not present at the liquor store attacks, he does  
 13 not, and indeed cannot, dispute that this was the information that Sergeant Arotzarena  
 14 based his belief on, and which the magistrate deemed sufficient to support the warrant for  
 15 plaintiff's arrest.

16 These facts were sufficient to establish probable cause under the "totality of the  
 17 circumstances" test enunciated in *Illinois v. Gates*. U.S. v. Rowland, 464 F.3d 899, 907  
 18 (9<sup>th</sup> Cir. 2006). That test "takes into consideration the informant's veracity, or reliability  
 19 and his basis of knowledge." Id. Probable cause is dependent on "the content of  
 20 information possessed by police and its degree of reliability." Id. Thus, if the information  
 21 "has a relatively low degree of reliability, more information will be required to establish the  
 22 requisite quantum of suspicion than would be required if the tip were more reliable." Id.

23 The 9<sup>th</sup> Circuit looks at several factors in order to assess reliability. These include

24 \_\_\_\_\_  
 25 <sup>4</sup> Penal Code section 236 governs false imprisonment; section 422.7 contains criteria  
 26 for aggravating factors, specifically for a crime committed for the purpose of intimidating  
 someone based on race, color, religion, etc., and if the crime includes "present ability" to  
 commit violence, or actual violence; section 594(a) governs vandalism.

1 whether the informant is known (as contrasted to anonymous), whether there is a track  
 2 record of reliability, if the informant reveals the basis for his (or her) knowledge; and if  
 3 there is predictive detail about future events that can be corroborated by police. Rowland,  
 4 464 F.3d at 907-908 (internal citations omitted). It should be noted, however, that the  
 5 Supreme Court has expressly abjured any rigid test, requiring instead an evaluation of the  
 6 “totality of the circumstances.” Illinois v. Gates, 462 U.S. at 238.

7 Here, the informant was known to Sgt. Arotzarena; indeed Sgt. Arotzarena met the  
 8 informant face to face. It was at that face to face meeting that Sgt Arotzarena concluded  
 9 the informant was “very credible and knowledgeable about the Bey organization.” DSE,  
 10 Exhibit 1 at paragraph 5; 1(H) at pg. 2. The 9<sup>th</sup> Circuit has specifically recognized that “an  
 11 agent’s face to face encounter with an informant may bolster an informant’s reliability  
 12 because officers may perceive and evaluate personally an informants mannerisms,  
 13 expressions and tone of voice and because the informant knows that he may be tracked  
 14 down and held accountable for false assertions.” Rowland, 464 F.3d at 908. In addition,  
 15 the informant identified the plaintiff both from the video, and from a DMV photograph. CI-  
 16 21 identified plaintiff on the basis of his height, weight, age, and baldness. DSE, Exhibit 1  
 17 at paragraph 7-9. The DMV photo shows plaintiff to have extremely short hair on 2/22/05,  
 18 and also confirms that plaintiff would have been almost 21 on the date of the liquor store  
 19 attacks. Id., Exhibit 1(A). His booking photograph establishes further that plaintiff, a month  
 20 after the incident, had relatively short hair. Id., Exhibit 1(G). The record also establishes  
 21 that the informant identified Yusef Bey IV from the video; shortly after the informant’s  
 22 positive ID (and before plaintiff’s arrest), Yusef Bey IV’s mother called to say her son  
 23 wanted to talk to the police about the vandalism, thus corroborating at least one of the CI’s  
 24 positive identifications. DSE, Exhibit 1 at paragraphs 10-11; 1(H) at pg 3. Rowland, at  
 25 908 (citing Gates at 243-245 and n. 13). And finally, CI-21 offered this information even  
 26 in the face of fear of retaliation by the suspects he identified. Id., Exhibit 1(I) at pg.2.

1       Evaluating the information known to Sgt. Arotzarena and included in the affidavit to  
 2 the magistrate, the totality of the circumstances establishes sufficient probability that would  
 3 give someone of reasonable caution a basis to believe that a crime had been committed,  
 4 and that it had been committed by plaintiff. Defendants are accordingly entitled to  
 5 judgment with respect to any claims based on plaintiff's initial arrest. Rowland, 464 F.3d at  
 6 908; see also U.S. v. Dobbs, 2007 WL 2318971 (N.D. Cal. 2007) (discussing standards for  
 7 reliability based on informant).

8       **b. Subsequent Incarceration**

9       Plaintiff also seeks to recover on the grounds that there was not probable cause to  
 10 detain him on charges after he had been arrested on the basis of the facially valid warrant.  
 11 The basis for these claims, as set forth in his complaint, is that he should not have been  
 12 held, because no one looking at the video could have concluded that the person there was  
 13 the plaintiff.

14       Plaintiff however, cannot escape the fact that, independent of the video, two  
 15 witnesses identified plaintiff on the basis of a photo lineup as one of the attackers in the  
 16 liquor store. More specifically, one of the employees who was attacked identified plaintiff  
 17 as the participant who "when (sic) behind the counter & was wearing a black suit & white  
 18 shirt." DSE, Exhibit 1(E); 1(H) at 9. That independent identification corroborates the CI's  
 19 identification of plaintiff in the video as "the MB behind the counter." Id., Exhibit 1(H) at pg.  
 20 2. Thus, contrary to plaintiff's allegations, someone could, and did identify plaintiff as a  
 21 perpetrator of these hate crimes.

22       Plaintiff's deposition testimony, which is considerably at variance with the  
 23 allegations of his complaint, do not require a different result. The independent  
 24 identification was sufficient to establish probable cause, regardless of plaintiff's  
 25 protestations of innocence, or what Arotzarena may or may not have said to plaintiff. See  
 26 Skousen v. Brighton High School, 305 F.3d 520, 528 (6<sup>th</sup> Cir. 2002) ("Eyewitnesses have

1 firsthand knowledge and are presumed to be reliable and truthful"); Russo v. City of  
 2 Bridgeport, 479 F.3d at 203-204 (arrest based on identification by victim of robbery  
 3 sufficient to establish probable cause negating false arrest and false imprisonment  
 4 charge).<sup>5</sup> The eyewitness identification is in itself sufficient to establish probable cause,  
 5 and defendants are entitled to judgment as to claims related to plaintiff's incarceration  
 6 following his arrest as well.

7       **c. Strip Searches**

8           There is nothing in the record of this case demonstrating that defendants had any  
 9 role or knowledge about unlawful strip searches at the County jails where plaintiff was  
 10 held, and they are entitled to judgment on those claims.

11       **3. 5th Amendment**

12           In his SAC, plaintiff claims that Sgt. Arotzarena told plaintiff's father that he knew  
 13 plaintiff wasn't in the video, but that he was going to send him to jail anyway because he  
 14 refused to talk. These are apparently the allegations in support of what may be a 5<sup>th</sup>  
 15 Amendment claim.

16           There is no evidence demonstrating plaintiff was coerced or compelled to testify  
 17 against himself, and he has thus failed to support any claim under the 5<sup>th</sup> Amendment .  
 18 Cooper v. Dupnik, 963 F.2d 1220, 1238 (9<sup>th</sup> Cir. 1992).

19       **4. Individual Defendants**

20           In addition to Sgt. Arotzarena (who, as discussed at length above, cannot be liable  
 21 because he committed no violation of plaintiff's constitutional rights), plaintiff has named

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22       **5** As explained above, Russo also considered liability based on "prolonged detention"  
 23 in the face of repeated claims of innocence. The court found the officers liable under the  
 24 "prolonged detention" theory because they withheld exculpatory information: Russo was  
 25 heavily tattooed, while the perpetrator, who appeared in a video was not. The officers kept  
 26 the video, which was the only evidence showing the perpetrator did not have tattoos, from  
 the defense, and, it would appear, from state investigators. Once it was disclosed, after  
 217 days in jail, Russo was freed. Id., 479 F.3d at 209-211. Those facts are markedly  
 different from the facts of this case.

1 Oakland Police Chief Wayne Tucker, Deputy Chief Howard Jordan, Lieutenant Gier,  
 2 Lieutenant Whitman and Officer J. Morris as defendants. Each of these defendants is  
 3 identified as having "personally directed and taken part in unlawful polices (sic) in this  
 4 complaint."

5 Plaintiff has not adduced any evidence to support claims against Lieutenants  
 6 Whitman and Gier, or against Officer Morris, and they are entitled to judgment. Plaintiff in  
 7 fact conceded at his deposition that these defendants were named largely because they  
 8 were in the chain of command, without any evidence that they participated in the events in  
 9 a way that might conceivably form a basis for individual liability. DSE, Exhibit 2(A) at 52:1-  
 10 59:20; see Larez v. City of Los Angeles, 946 F.3d 630, 646 (9<sup>th</sup> Cir. 1991) (discussing  
 11 standards and evidentiary showing required for individual liability of police chief); see also  
 12 Harris v. Roderick, 126 F.3d 1189, 1204 99<sup>th</sup> Cir. 1997) ("a supervisor is only liable for  
 13 constitutional violations of his subordinates if the supervisor participated in or directed the  
 14 violations or knew of the violations and failed to act to prevent them.") In the absence of  
 15 evidence of participation by these individuals in the conduct alleged, they are entitled to  
 16 judgment.

17 **5. Qualified Immunity**

18 "[O]fficers are entitled to qualified immunity even if they acted unconstitutionally, as  
 19 long as a reasonable officer could have believed the conduct lawful." Alexander v. County  
 20 of Los Angeles, 64 F.3d 1315, 1322 (9<sup>th</sup> Cir. 1995). The first inquiry in the qualified  
 21 immunity defense is whether the facts alleged indicate that the officer's conduct violated a  
 22 constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001). If no right would have been  
 23 violated on the facts alleged, there is no need for further inquiry into immunity. Id. If a  
 24 constitutional violation can be established, courts next inquire "whether the right was  
 25 clearly established in the specific context of the case, rather than as a broad general  
 26 proposition." Id. The dispositive inquiry in determining whether a right is clearly established

1 is “whether it would be clear to a reasonable officer that his conduct was unlawful in the  
 2 situation he confronted.” Id.

3       **a. Plaintiff Cannot Show A Violation of a Constitutional Right**

4       As developed above, plaintiff cannot show a violation of his constitutional rights.  
 5 Under Saucier, the inquiry need go no further, and Sgt. Arotzarena is entitled to judgment  
 6 accordingly. Id. at 201.

7       **b. Sgt. Arotzarena Could Have Reasonable Believed Their Conduct Was  
 8 Lawful**

9       Even were plaintiff had shown a violation of his rights by Arotzarena, the evidence  
 10 shows beyond reasonable dispute that Sergeant Arotzarena could have reasonably  
 11 believed that there was probable cause to arrest and then detain plaintiff as a suspect in  
 12 the attacks on the liquor stores. His reliance on the identification by the confidential  
 13 informant, who's reliability was established on the basis of both a face to face meeting and  
 14 by the department's own intelligence unit, who's information was corroborated by Yusef  
 15 Bey's coming forward, and then later by the personal identification by the employees  
 16 victimized by the violence, was entirely reasonable and justified under established law.

17 Illinois v. Gates, 462 U.S. at 236-238; Rowland, 464 F.3d at 208. Similarly, his  
 18 subsequent action in detaining plaintiff as a suspect pending charges by the District  
 19 Attorney was justified by the independent identification of plaintiff in the photo line-up by  
 20 the two employees as the individual “behind the counter” who detained them against their  
 21 will—an identification directly corroborated the earlier identification of plaintiff by the CI.  
 22 Here again, the practice of utilizing photographic “line-ups” is well established as a  
 23 permissible police practice, and one that is sufficient to establish probable cause. See e.g.  
 24 McNeary v. Stone, 482 F.2d 804, 806 (9<sup>th</sup> Cir. 1973) (citing Simmons v. United States, 390  
 25 U.S. 377, 384 (1968).) Indeed, eyewitness identification of the sort that occurred here is  
 26 afforded a presumption of reliability. Skousen v. Brighton High School, 305 F.3d at 528

1 ("Eyewitnesses have firsthand knowledge and are presumed to be reliable and truthful.")

2       **6.     City Liability**

3       Plaintiff also seeks recovery against the City of Oakland on the basis of what is  
 4 evidently a claim for municipal liability under Monell v. New York Department of Social  
 5 Services, 436 U.S. 658, 694 (1978). . He himself says he had no knowledge of any  
 6 practice by the City of Oakland of arresting individuals that they know were the wrong  
 7 suspect. DSE, Exhibit A (1) at 60:13-25. The record shows that the City has in place  
 8 constitutionally valid policies related to probable cause, warrants, and arrests. DSE,  
 9 Exhibit 5 and attached exhibits. Plaintiff cannot show that he suffered a deprivation of his  
 10 rights attributable to an official policy of the City of Oakland.

11       **B.     State Law Claims**

12       The Second Amended Complaint seeks recovery under California law for false  
 13 arrest and imprisonment, negligence, negligent infliction and emotional distress, and the  
 14 California Constitution Article I, sections 13 and 7(A). As developed below, defendants  
 15 are entitled to judgment on these claims as well.

16       **1.     Claims Against The City**

17       This court previously dismissed plaintiff's state law tort claims against the City with  
 18 leave amend to allege a statutory basis for recovery. Plaintiff's Second Amended  
 19 Complaint fails to remedy that fundamental defect, and the City is entitled to judgment with  
 20 respect to any claim for damages.

21       As to the claims under the California Constitution, the court previously dismissed  
 22 the causes of action against the City based on claims for monetary relief under section  
 23 7(A) and 13, but granted plaintiff leave to amend to tie his claims for non-monetary relief to  
 24 his constitutional claims. The Second Amended Complaint fails to do this, and the City is  
 25 entitled to judgment accordingly.

26       **2.     Individual Defendants.**

1 All of plaintiff's state law claims against the individual defendants arise from his  
2 allegations of false arrest and false imprisonment. As explained above, the individual  
3 defendants are not liable because there was reason to believe there was probable cause  
4 to both arrest plaintiff initially and to turn over the matter to the district attorney. O'Toole v.  
5 Superior Court, 140 Cal. App. 4<sup>th</sup> 488, 511-512 (2006). Additionally, the City defendants  
6 are immune from liability for damages for any imprisonment that occurred following  
7 arraignment. Asgari v. City of Los Angeles, 15 Cal. 4<sup>th</sup> 744, 758-759 (1995); Gillan v. City  
8 of San Marino, 147 Cal. App. 4<sup>th</sup> 1033, 1049-1050 (2007). Moreover, under California law,  
9 officers are not liable for false arrest or false imprisonment if their actions were taken  
10 pursuant to a lawful warrant, or there was reasonable cause to believe the arrest was  
11 lawful. O'Toole, 140 Cal. App. 4<sup>th</sup> 510-511; Galvin v. Hay, 374 F.3d 739, 758 (9<sup>th</sup> Cir.  
12 2004). Here, Sgt. Arotzarena had reasonable cause to believe that both plaintiff's initial  
13 arrest and the subsequent incarceration prior to his arraignment were lawful.  
14 Consequently, regardless of the substantive state law claim, Sgt. Arotzarena and all the  
15 other individual defendants are immune from liability for such claims.

16 In conclusion, the record shows that there are no disputed issues of material fact as  
17 to any of plaintiff's claims, and defendants are entitled to judgment accordingly.

## 18 || IT IS SO ORDERED.

19 Dated: 10/27/08

Janice B. Armstrong  
UNITED STATES DISTRICT JUDGE